IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

WILLIAM DUDLEY PELLEY,
Petitioner and Appellant Below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

No. .....

LAWRENCE A. BROWN,
Petitioner and Appellant Below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

No. .....

FELLOWSHIP PRESS, INC.,
Petitioner and Appellant Below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellee Below.

No. .....

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I

OPINIONS OF THE COURTS BELOW

1. In overruling the Petitioners' Pleas in Abatement the District Court rendered and filed no written opinion.

The District Court merely found for the United States of America as against each of the Petitioners upon their Pleas in Abatement, and that the indictment herein should not abate, to which finding each of the Petitioners duly excepted. (Record pp. 73 and 286.) Thereupon the Court entered judgment that the Pleas in Abatement be overruled and denied as to each of Petitioners and that the indictment should not abate, to which judgment each of the Petitioners at the time duly excepted. (Record pp. 73 and 286.)

2. In passing upon the Demurrers to the indictment and each count thereof, the District Court rendered no written opinion. The District Court overruled the Demurrers, to which ruling each of the Petitioners duly excepted. (Record p. 256.)

3. The District Court rendered no written opinion upon the Petitioners' Motion for a Bill of Particulars but overruled the same, to which action of the Court, the Petitioners each duly excepted. (Record p. 263.)

4. The Petitioners filed separate written Motions and reasons for a new trial. (Record pp. 574 to 600.) The District Court rendered no written opinion upon the Motions for a New Trial, but overruled the same, to which action of the Court the Petitioners each duly excepted. (Record pp. 600 to 601.)

5. The District Court rendered judgment upon the verdict adjudging the Petitioners guilty as charged in the indictment and providing that the Petitioner Pelley should serve fifteen years in prison; the Petitioner Brown should serve five years' imprisonment and that the Petitioner Fellowship Press, Inc., should be fined in the sum of Five Thousand ($5,000.00) Dollars. (Record pp. 601 to 602.)

6. The opinion of the United States Circuit Court of Appeals for the 7th Circuit affirming the final judgment of the District Court is printed at pp. 646 to 664 of the record, but the same is not yet reported in the official reports.

II

JURISDICTION

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction is fully set out in the Petition for the Writ of Certiorari at page 4; which is hereby adopted and made a part of this Brief.

III

STATEMENT OF THE CASE

A full statement of the case having been given in the Petition for Certiorari at pp. 2-4, for the sake of brevity is not here repeated, but is hereby adopted and made a part of this Brief.

IV

SPECIFICATION OF ERRORS

The Honorable Circuit Court of Appeals for the 7th Circuit erred:

(1) In failing to reverse the judgment of the District Court overruling Petitioners' Pleas in Abatement, which ruling embodied the decision of a question of law contrary to and in contravention of Amendments 5 and 19 to the Constitution of the United States; and in conflict with the applicable decisions of this Honorable Court, and the Statutes of the United States. (Record pp. 660 to 662.)

(2) In deciding that there was no evidence that there

were no names of women among those supplied and placed in the box from which the names of grand jurors were drawn. (Record pp. 660 to 661.)

(3) In deciding that there is a distinction between this case and cases where persons of defendants, race or creed were intentionally excluded from juries, and that therefore no prejudice to the case of Petitioners is shown or inferable. (Record pp. 660 to 661.)

(4) Because the decision of the Circuit Court of Appeals is in opposition to Amendments 5 and 19 thereof, wherein the Circuit Court of Appeals holds in effect that even though certain classes of citizens are excluded from a grand jury, only those who belong to the excluded classes can complain of exclusion. (Record p. 661.)

(5) In failing to decide that due process of law means that grand juries should be impartially selected from the citizens at large, without regard to race, creed, color or previous condition of servitude. (Record pp. 660 to 661.)

(6) In deciding in effect that the Petitioners were obliged to show that they had been prejudiced or to show that such a state of facts existed from which prejudice would be inferable, because of the absence of women on the grand jury. (Record p. 661.)

(7) In failing to decide that it should be presumed that Petitioners were harmed by the exclusion of women from the grand jury.

(8) In holding in effect that because it was agreed that the names of the jurors were drawn in strict accordance with the law, that such agreement pertains to the manner and method of selecting and obtaining the names of prospective grand jurors before the drawing. (Record p. 661.)

(9) In failing to decide that it was the duty of the Jury Commissioners who selected the names which were placed in the grand jury box before the drawing, to use reasonable care to ascertain the qualifications of the persons whose names were placed therein and to see that no discrimination resulted in the method of obtaining the names of persons for such purpose.

(10) In deciding that the Attorney General and his assistant Attorney Generals were authorized to appear before the grand jury and to participate in the grand jury investigations and deliberations, upon the authority of the Act of Congress of June 30, 1906. Chap. 3935, 34 Stat. 816, 5 U. S. C. A. 310.

(11) In deciding that officers of the Executive Department of the United States are warranted in appearing and remaining before grand juries while witnesses are being examined thereby, and in taking part in the judicial inquiries, investigations and deliberations of a United States Grand Jury while in session. (Record pp. 661 to 662.)

(12) In deciding that each count of the indictment herein is sufficient although the decision is in conflict with the decisions of other Circuit Courts of Appeals and in conflict with the decisions of this Honorable Court. (Record pp. 658 to 659.)

(13) In deciding that the charges concerning false statements (the first nine counts of indictment) in the words of the statute "etches the crime in terms incapable of further clarification, and completely apprises the defendants of the charges which they have to meet and refute." (Record pp. 658 to 659.)

(14) In failing to decide whether or not counts 10, 11 and 12 of the indictment are sufficient.

(15) In failing to decide whether or not the Petitioners were entitled to a Bill of Particulars to clarify certain averments of each count of the indictment.

(16) In failing to decide whether or not Government's Exhibits Numbered 13, 15, 16, 17, 18, 20, 30, 33A, 33B, 33C, 33D, and 34 were admissible in evidence as against each of the Petitioners.

(17) In deciding that the testimony consisting of the conclusions of the Government's witnesses, Mrs. Persis Richter, Harold Graves, and Harold Laswell, was admissible as against each of the Petitioners. (Record pp. 662 to 663.)

(18) In failing to decide whether or not the said Exhibits and each of them were admissible as against each of the Petitioners Lawrence A. Brown and Fellowship Press, Inc.

V

A. PLEAS IN ABATEMENT

The Petitioners earnestly contend that the Circuit Court of Appeals for the 7th Circuit erred in failing to reverse the judgment of the District Court, overruling their Pleas in Abatement: First, because persons of the female sex having the qualifications to sit upon grand and petit juries in the District Court were in effect excluded from such service. Second, because two Assistant Attorney Generals, appointed and deputized by the Attorney General of the United States, were not only permitted to be present during the grand jury investigation, and the hearing of testimony of witnesses before the grand jury which returned the indictment in this case, but one of such Assistants was chiefly in charge of the conduct of those investigations. (R. p. 284.)

1. As to the first contention that women, as a class, were excluded from grand jury service, we should examine the record to see whether or not that proposition is supported.

Up to and until about December 28, 1941, it had always been the practice in the District Court for the Clerk and Jury Commissioner, in order to obtain names to be placed in a box from which grand and petit jurors were drawn, to address letters to the various Judges of the County Circuit Courts of Indiana, requesting each of the Judges to furnish the names of twenty-five or more *men* residing in each of the counties, respectively, qualified for jury service in the United States District Court for the Southern District of Indiana. (R. pp. 272-273.)

Sometime prior to December 28, 1941, which was the last time that names of prospective jurors were placed in the box, the Clerk and Jury Commissioner addressed

similar letters to the various Judges, except that the word "men" was stricken from the letter and supplanted by the word "persons" and on or about that date the Clerk and Jury Commissioner, having obtained the names from the various county Judges in that manner, placed over fourteen hundred of such names in the box. (R. pp. 265-266.) The Clerk and Jury Commissioner did not go into the qualifications of the persons whose names were thus obtained, and apparently depended upon the selection by the county Judges. (R. p. 266.) Thus the Clerk and Jury Commissioner, who were charged by statute with the duties pertaining to their offices, delegated their authority to the various county Judges, which we contend is contrary to law, and an improper way to obtain the names to be placed in such a box, so that the names of prospective jurors thus obtained were not lawfully placed therein; and, of course, it follows that the drawing of such names for grand jury service would be illegal, and a grand jury composed of such persons drawn therefrom would not be lawful, and would not have the authority to return any indictment under any circumstances. This contention is supported by the cases of Glasser v. United States, 315 U. S. 60 at p. 85, 62 S. C. Rep. 457; U. S. v. Murphy D. C., 224 Federal 554; In re Petition for Special Grand Jury D. C., 50 Federal (2d) 973. These cases are partially predicated upon Sections 275 and 276 of the Judicial Code; 28 U. S. C., Secs. 411-412; 28 U. S. C. A., Secs. 411-412. In the Glasser case it is pointed out at p. 85 of the 315 U. S. Report, that when the original Constitution provided for the trial of crimes by jury, "The people and their representatives, leaving nothing to chance, were quick to implement that guarantee by the adoption of the 6th Amendment which provides that the jury must be impartial"; and again quoting from the opinion:

> "It is a part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

In the Glasser case the Court, at p. 85 of the 315 U. S. Report, also decided upon the authorities cited therein that jurors are to be selected by the Clerk of the Court and a Jury Commissioner, and that:

> "This duty of selection may not be delegated. * * * And, its exercise must always (p. 86) accord with the fact that the proper functioning of the jury system, and, indeed our democracy itself, requires that the jury be truly representative of the community, not the organ of any special group or class."

In this case it is stated in effect that while the officers in charge of choosing jurors may exercise some discretion, to the end that competent jurors may be called, yet—

> "They must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any other method other than a process which will insure a trial by a representative group, are undermining processes weakening the institution of jury trials and should be sturdily resisted."

The Petitioners were indicted for infamous crimes.

> Mackin v. U. S., 117 U. S. 348, 6 Supreme Court Reporter 777.

The Petitioners could not be tried for the offenses charged against them except upon grand jury indictments.

> Ex Parte Wilson, 114 U. S. 417, 5 Supreme Court Reporter 935;

Ex Parte Bain, 121 U. S. 1, 7 Supreme Court Reporter 781;
Parkinson v. U. S., 121 U. S. 281, 7 Supreme Court Reporter 896.

The Act of Congress, approved March 1, 1875, among other things, declared:

> "No citizen possessing all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit jurors in any court of the United States or of any state, on account of race, color, or previous condition of servitude."
>
> 18 Stat. L. pt. 3, p. 336.

The qualifications of jurors, grand or petit, in the District Courts of the United States are fixed by statute. (28 U. S. C. A. 411.) This statute provides that jurors shall have the same qualifications as jurors of the highest court of law in the state which is the *locale* of the district.

Under the statutes and the Constitution of Indiana, women were and are eligible to serve as jurors on the same basis as men.

Palmer v. State, 197 Ind. 625, 150 N. E. 917;
Walter v. State, 208 Ind. 238, 195 N. E. 268 at p. 270.

The Honorable Circuit Court of Appeals inadvertently decided, among other things, that there was no evidence that there were no names of women in the jury box from which this grand jury was drawn. As we have seen, over 1,400 names were placed in the box about December 28, 1941. (R. p. 265.) The Clerk and Jury Commissioner knew what names they placed in the box. (R. p. 266.) The Clerk testified that he did not know whether there were any women's names placed in the box at the last time

names were placed therein. (R. p. 266.) The Clerk would not say that the name or names of any woman or women were placed in the box. (R. pp. 265-287.) The first time that the Clerk and Commissioner called upon the county Judges to furnish the names of "persons" as distinguished from "men" was just previous to December 28, 1941. (R. pp. 265-266.) No woman had served as a grand or petit juror in the District Court of the United States up to and including the time of this trial. (R. p. 267.) The fifty-five names which were drawn pursuant to an order of the Court on May 5, 1942, from which this grand jury was impaneled, were all of men. (R. pp. 274-276.) The grand jurors which were selected, and who returned the indictment in this case were all men. (R. pp. 278-279.)

It is undisputed that women were excluded from the grand and petit juries prior to December 1, 1941, for the Clerk and Jury Commissioner in writing to the various county Judges requested the names of qualified "men" as we have seen. (R. pp. 265-267.) Now, the fact that about December 28, 1941, fourteen hundred names were placed in the jury box, and names were drawn therefrom from time to time for grand and petit juries, and the names of no women appeared, among those drawn, beyond peradventure excludes the idea of chance, accident, or coincidence. As said in the case of Smith v. State of Texas, 311 U. S. 128 at p. 131, 61 S. C. Rep. 164 at p. 165:

> "Chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a period as sixteen years or more."

In the case at bar the Clerk says that no women served for fourteen years. The Clerk and Jury Commissioner made no effort to ascertain whether or not there were

women qualified to serve as grand jurors in the District, or who such persons were. They thus failed to perform their constitutional duty recognized by Sec. 4 of the Civil Rights Act of March 1, 1875, 8 U. S. C., Sec. 44; 8 U. S. C. A., Sec. 44, not to pursue a course of conduct in administration of their offices which would operate to discriminate in the selection of jurors.

> Hill v. State of Texas, 316 U. S. 400 at 404;
> 62 S. C. Rep., 1159 at 1161.

In the case at bar it appears that for many years the Clerk and Jury Commissioner have called upon the county Judges to furnish the names of men only, and that custom prevailed until sometime shortly before December 28, 1941, when they called for qualified "persons" as we have already seen. The fact that county Judges apparently furnished only the names of men leads to the rational conclusion that the county Judges had become accustomed to furnishing the names of men only; at least the Clerk and Jury Commissioner left it to the county Judges to discriminate and select the names of men only, as such Judges desired. If one of such Judges so discriminated and the fruits of his discrimination were accepted by the Clerk and Jury Commissioner, such would invalidate the grand jury. The Government did not assert or attempt to prove that there were ever any women's names placed in the jury box, so we believe that the Petitioners made a prima facie case, to the effect that there was, by the custom and conduct in the administration of the offices of Clerk and Jury Commissioner in respect to the selection of jurors' names, a discrimination. We earnestly say that the uncontradicted evidence on the Plea in Abatement shows that such a discrimination resulted.

We think that the Honorable Circuit Court of Appeals

was in error in holding in effect as it did, that even though women were excluded from grand jury service that the Petitioners could not avail themselves thereof because they had not shown that—

> "No prejudice to defendants' cause was shown, nor is any inferable, because of the absence of women on the grand jury, as might readily exist where all persons of defendants' race or creed were intentionally excluded." (Quoting from the C. C. A. opinion in this case, Record p. 661.)

The right to indictment by grand jury for an infamous crime is an inalienable and inviolable right, because the same is guaranteed by the Constitution, and such is just as sacred as the right to trial by jury for an infamous crime. (Constitution of the U. S., Amendment 5.) The distinction which the Honorable Circuit Court of Appeals attempts to draw between this case and cases where colored persons were excluded from serving on a grand jury may be illuminated by the fact that the decisions as to colored persons are upon the theory that because negroes were excluded persons of that race were denied the equal protection of the law (Constitution of the U. S., Amendment 14), and those questions arose in cases between the various negro defendants and the states in which they were charged with crime, and to which the 14th Amendment applied, because the questions were between the citizens and the states; but the question here is whether or not the right to an impartial grand jury under the Constitution may be violated at all by discrimination arising through misconduct or negligence, or through the delegation of powers by those charged with obtaining the names of persons having the qualifications to sit. Under the constitutional doctrine that juries and grand juries should reflect a cross-section of the community, a discrimination

against any class of citizens would naturally and logically result in depriving citizens charged, or to be charged, with infamous crimes, of the benefit of juries or grand juries drawn from the citizens at large. Unmistakably, the Constitution contemplates that juries and grand juries must be impartially obtained, selected, and drawn from the citizens at large without any kind of discrimination; and it is undoubtedly the duty of the Clerk and Jury Commissioner to see to it that there is no exclusion. Otherwise, persons of certain religious principles could be excluded; members of certain political parties could be excluded; and men could be excluded as well as women. The Clerk and Jury Commissioner in the case at bar knew that, by custom, for many years women had been excluded, and the first time they attempted to avoid that exclusion was shortly before December 28, 1941, when they sent out requests to the Judges of the county Courts for the names of qualified "persons." But this did not satisfy the constitutional and statutory requirements of their offices, for with knowledge that women had been excluded for many years, and that a custom had been established among the county Judges, to whom they had delegated their authority, they should have been careful, at least reasonably careful, to determine that there was no discrimination arising from the custom. On the contrary, the Clerk says under oath that they did not go into the qualifications of the 1,400 persons whose names were thus obtained, and did not find out whether they were men or women. (R. p. 266.) The Clerk testified:

> "We did not go into the qualifications of the persons whose names we thus obtained and made no special effort to ascertain whether those persons were men or women." (Record p. 266.)

2. The second question which arises under the Petition-

ers' Pleas in Abatement is as to the authority of the Attorney General of the United States to appoint Assistant Attorney Generals to appear before a grand jury, to be present while a grand jury is hearing evidence and investigating a case, and to participate in grand jury proceedings.

Let us first examine the character of the office of Attorney General. There can be no doubt but that the offices of the Department of Justice and Attorney General are Executive, and part of the Executive Department of the United States Government.

> "There shall be at the seat of Government an Executive Department to be known as the Department of Justice, and an Attorney General, who shall be the head thereof."
>
> R. S. 346, 5 U. S. C. A. 291;
> U. S. Constitution, Article 2, Section 2.

Under Article 2, Section 2, Clause 1, of the Constitution of the United States, the Attorney General's office—the Department of Justice—is a department of the Executive branch of the Government.

U. S. v. Germaine, 99 U. S. 508, 511, 25 L. Ed. 482.

The office of District Attorney is judicial, or at least quasi-judicial. The investigation of a supposed case by a United States grand jury, the hearing of testimony of witnesses and proceedings preceding the return of an indictment are judicial in their nature. The District Attorney may assist in the examination of witnesses, may advise the grand jurors as to the law, he may advise them as to the admissibility of evidence, and advise them as to the proper mode of procedure, review the evidence, and explain the testimony with reference to the law of the case. His duties before the grand jury are somewhat

similar to the duties of a trial Judge in a federal District Court trying a criminal case by jury.

United States v. Rintelen, 235 Fed. 787;
U. S. v. Mitchell, 136 Fed. 896;
U. S. v. Cobban, 127 Fed. 713;
U. S. v. Kilpatrick, 16 Fed. 765;
Sloop v. People, 45 Ill. App. 110.

"It shall be the duty of every District Attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States * * *." (R. S., Sec. 771, 28 U. S. C. A. 485.)

"A District Attorney is not a member of the Department of Justice, but is a separate judicial officer, with powers and duties defined by statute."

Fish v. U. S. (D. C. N. Y. 1888), 36 Fed. 677, 680, citing U. S. v. Macdaniel, 7 Pet. 1, 8 L. Ed. 587.

The powers entrusted to the Government are divided into three grand departments of the Executive, the Legislative, and the Judicial. The functions appropriate to each of these branches of Government shall be vested in a separate body of public servants, and the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is essential to the successful working of the system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, and that each shall by the law of its creation be limited to the exercise of the powers appropriate to its department and no other.

Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377 at p. 387 (and many other cases of like tenor and effect).

It is not necessary that the participation of unauthorized persons in a grand jury investigation and proceeding be corrupt or unfair. Such would be an unlawful invasion of the right of the citizen. It is intended for the protection of the Government and the citizen. The rights thus secured cannot be invaded without detriment to each.

> Latham et al. v. U. S. (U. S. C. A. 5th), 226 Fed. 420.

The Honorable Oscar R. Ewing and the Honorable Henry A. Schweinhaut were appointed special Assistants to the Attorney General of the United States under authority of the Department of Justice. (R. pp. 268-270.) As to the participation of these two gentlemen before the grand jury the evidence shows that the Honorable Mr. Ewing was chiefly in charge of the grand jury investigations and was assisted by the Honorable Mr. Caughran, the District Attorney, and the Honorable Mr. Schweinhaut, Assistant Attorney General. The Honorable Mr. Ewing testified:

> "Mr. Schweinhaut was with me and assisted me before the grand jury that had charge of the investigation of this case. I had charge of the investigation. It was a three horse team consisting of Mr. Schweinhaut, Mr. Caughran and myself. I had charge of the three horse team." (R. p. 284.)

Thus it appears that the Honorable Mr. Ewing in effect supplanted the Honorable Mr. Caughran, District Attorney, in the discharge of the latter's duties before the grand jury.

The authority for the Honorable Court of Appeals in deciding that the Assistant Attorneys General were duly authorized to appear before the grand jury and to conduct the proceedings and be present while witnesses were

testifying, and to take part during the deliberations of that body, is the Act of Congress of June 30, 1906, Chap. 3935 (34 Stat. 816, 5 U. S. C. A. 310), which is as follows:

> "The Attorney General or any officer of the Department of Justice, or any Attorney or Counselors specially appointed by the Attorney General under any provision of the law, may, when thereunto specially directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before Committing Magistrates, which District Attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought."

This statute is unconstitutional in that it is contrary to Sections 1 and 2 of Article 3 of the Constitution of the United States. For, as we have seen, only judicial officers could properly participate in the judicial function of an investigation by a grand jury, and the statute above referred to authorizing the Attorney General, who is an Executive officer, to personally participate or to appoint his Assistants to participate in grand jury proceedings, is in the nature of a legislative provision attempting to authorize an invasion of the Judiciary by the Executive Department of the Government of the United States, and, in support of this contention, we cite, without repeating, each of the authorities cited and set forth under the fifth reason relied upon for the allowance of the Writ, contained in the Petition for the Writ of Certiorari, at p. 8.

B. THE SUFFICIENCY OF THE INDICTMENT

1. The Honorable Circuit Court of Appeals erred in affirming the decision of the District Court in overruling petitioners' demurrers to each of the counts of indictment.

Petitioners, charged with crime, have a constitutional right to be informed sufficiently of the nature and cause of the accusation against them.

Constitution of the United States, 5th and 6th Amendments.

The statute upon which the indictment is founded only describes the general nature of the offenses prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offenses, states no matter upon which issue could be formed for submission to a jury.

It is not always sufficient to charge statutory offenses in the language of the statutes, and where the offense includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars.

United States v. Hess, 124 U. S. 483, at page 486, 8 Sup. Ct. 571, at page 573;

Armour Packing Co. v. United States, 209 U. S. 58, 83, 28 Sup. Ct. 428, at page 436;

Keck v. United States, 172 U. S. 434, 19 Sup. Ct. 254, at page 255;

Foster et al. v. United States (C. C. A. 9, 1918), 253 Fed. 481, at pages 482-483.

Neither of the counts of the indictment contains every element of the offense intended to be charged, nor to sufficiently apprise the petitioners of what they must be prepared to meet and, in case any other proceedings should be taken against them for a similar offense, the record does not show with accuracy to what extent they may plead a former acquittal or conviction.

United States v. Cruikshank, 92 U. S. 542, at page 558, 23 L. Ed. 588;

Peters v. United States, 36 C. C. A. 105, 94 Fed. 127, at page 131;

Foster et al. v. United States (C. C. A. 9, 1918), 253 Fed. 481, pages 482-483;

Skelley v. United States (C. C. A. 10, 1930), 37 Fed. (2d) 503, at page 504.

In Frohwerk v. United States, 249 U. S. 204, at page 208, it is said: "We do not lose our right to condemn either measures or men because the country is at war. It does not appear that there was any *special* effort to reach men who were subject to the draft." There is a vast difference between statements such as Debs made (United States v. Debs, 249 U. S. 211) and as Schenck made (Schenck v. United States, 249 U. S. 47), which were in the nature of an appeal to those in or liable to become members of the military and naval forces, and this case where there was absolutely no such appeal.

Now, we are dealing with articles which are not in the nature of an appeal to those in or likely to become members of the military and naval forces, but simply vehement criticism of the administration for "getting us into war" and statements and opinions concerning the dangers of the war, and a statement that "We are bankrupt," and statements concerning the fact that there was no unity for the war and statements which might be construed to be pro-Axis in their nature, but they are not appeals to the armed forces to refuse duty or to commit mutiny, or insubordination, or to refuse to enlist or to refuse to serve if drafted, so that it was necessary for the government to charge other facts and circumstances showing how these articles were for the purpose of affecting the military and naval forces. As was said in the case of Swift & Co. v. U. S., 196 U. S. 375, 25 S. Ct. 276 at p. 279, "Where acts

are not sufficient in themselves to produce a result which the law seeks to prevent * * * but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen."

The Constitution must be preserved and according to our conception, that is why we are in the war. The First Amendment of the Constitution is just as important as any other provision thereof. One of the safeguards that the American has to preserve that Constitution is the right of freedom of speech and freedom of the press, untrammelled by Congress or any other agency of the Government. The Constitution can not be enslaved and placed in chains and still preserved as the covenant of a free people. Dictatorships have arisen, by means of stifling a free press and free speech. That is the usual way a dictatorship is accomplished among people who value their heritage of freedom. If criticism may be silenced by using an Act of Congress to smother it, then our liberty is in danger, unless the line of demarkation between the constitutional guarantee is protected and preserved by our courts. Regardless of how disagreeable statements may be or how disagreeable or how unwarranted articles in the press may be—still such can not be condemned under the Sedition Act unless they were actually made for the express purpose of affecting the military and naval forces, and thereby aiding the enemies.

Abraham Lincoln said on January 12, 1848:

> "There is an important sense in which the Government is distinct from the Administration. One is perpetual, the other temporary and changeable. A man may be loyal to his Government and yet oppose

the peculiar principles and methods of the Administration."

The first eleven counts of the indictment do not allege that there was any special effort made by either one or all of the petitioners to reach men or persons with the intent or purpose to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or willfully obstruct the recruiting or enlistment service of the United States.

The sedition statute denounces at least three different offenses: first, wilful making or conveying of false reports during war with intent to interfere with the military and naval forces, etc.; second, an attempt to cause insubordination, disloyalty, etc., in the military and naval forces; third, the wilful obstruction of the enlistment service of the United States to the injury of the service or of the United States.

Shidler v. United States (C. C. A. Nev. 1919), 257 Fed. 620, at pages 622-623;
United States v. Dembowski (D. C. Mich. 1918), 252 Fed. 894, at pages 898, 899.

The first nine counts of the indictment attempt to charge the first of these offenses; and by conclusion only, allege that the statements and reports were false. The Government did not aver what it claimed was the truth in contrast to the statements alleged to have been false. Wherein such statements and reports were supposed to be false is not set out at all. So that the petitioners were not informed as to what constituted the facts upon

which the Government based its conclusion that such statements and reports were false. The falsity was essential to the charges contained in those counts, and the mere conclusion was not sufficient under the law.

United States v. Hess, 124 U. S. 483, at page 486, 8 Sup. Ct. 571, at page 573;
United States v. Cruikshank, 92 U. S. 542, at page 558, 23 L. Ed. 588;
Collins v. United States (C. C. A. 9, 1918), 253 Fed. 609, at page 611;
Constitution of the United States, Amendment 6;
27 American Jurisprudence, pp. 562-563, Sec. 55, and footnotes.

Count 10 was intended to charge the second offense but avers that the petitioners caused insubordination, disloyalty, etc., (which in itself would be a separate offense if properly charged); and in addition avers that they attempted to cause insubordination, disloyalty, etc., which also would constitute a separate offense in itself, if properly charged.

The tenth count of the indictment does not show how the petitioners caused or attempted to cause insubordination, disloyalty, etc., except by the conclusions therein contained. The publication quoted therein is not an appeal to anyone to become disloyal, or to refuse to do military or naval duty, or to engage in mutiny or other acts of resistance or violence against the constituted military and naval authorities.

How the utterances were to be used to cause insubordination, disloyalty, etc., is entirely left open to conjecture.

The petitioners had the right to demand and know the nature of this accusation by way of the averment of

facts showing how and by what means they were supposed to have caused and attempted to cause mutiny, etc.

Wong Tai v. United States, 273 U. S. 77, 71 L. Ed. 545, 47 Sup. Ct. 300, at page 301;
27 American Jurisprudence, pp. 623-625, Sec. 57, 58.

All the allegations of Count 10 to the effect that the petitioners "did knowingly, unlawfully, and feloniously cause, and attempt to cause, insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States to the injury of the United States" are by way of conclusion and recital. No facts are alleged in support of those conclusions which are quoted just above.

Count 11 of the indictment attempts to charge the petitioners with having unlawfully and feloniously obstructed the recruiting and enlistment service of the United States by publishing the articles, and that such said publications were calculated and intended by the petitioners to induce persons available and eligible for recruiting and enlistment service to fail and refuse to enlist, to the injury of the service and of the United States.

The statute does not include a mere attempt to obstruct the recruiting and enlistment service. There must have been an actual obstruction to support this count. The obstruction is the gist of the offense, and the petitioners were entitled to have been fully informed as to the alleged obstruction by the allegation of facts showing that there was an actual obstruction, where it took place and of what it consisted, so as to have enabled them to have investigated and intelligently presented their defenses.

United States v. Hall (D. C. Mont. 1916), 248 Fed. 150, at page 153.

Neither of these counts of indictment was so clear and accurate as to leave no doubt in the minds of the accused of the exact offenses intended to be charged, as required by law.

Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, at page 936;
Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, at page 775.

The publications set forth in the first eleven counts of the indictment are not upon their faces seditious, for they consist of opinions, predictions, criticisms, arguments and loose talk.

Under the rule of criminal pleading one should be reasoned not to be within the purview of a criminal statute, rather than to be reasoned to be within it.

The government was required to show how these articles were seditious—clearly and unmistakably.

United States v. Hall (D. C. Mont. 1918), 248 Fed. 150 at page 153;
United States v. Shutte (D. C. No. Dak. 1918), 252 Fed. 212, at page 213;
United States v. Eastman (D. C. S. D. N. Y. 1918), 252 Fed. 232, at page 233;
Fontana v. United States (C. C. A. 8, 1919), 262 Fed. 283, at page 286.

Neither of the counts of the indictment shows how and by what means the petitioners intended to use the quoted words, excerpts and articles to accomplish an interference with the operation and success of the military or naval forces of the United States or to promote the success of its enemies, or to cause insubordination, disloyalty or mutiny or refusal of duty in the military and naval forces,

or to wilfully obstruct the recruiting and enlistment service of the United States to its injury. The mere conclusion that they intended so to do is not sufficient. Without the intent there would be no crime. Did they intend to send or distribute the articles among any members of the armed forces or those liable to become members thereof? As to this the indictment is silent. The conclusion of intent could not supplant facts disclosing how they intended to so do and by what means the intent was to be carried out.

United States v. Schulze (D. C. Cal., S. D. 1918), 253 Fed. 377, at page 378.

Disloyal utterances, slander or libel of the President or of any other officer of the United States, or oratory, gossip, argument or loose talk are not seditious under the statute unless uttered with the wilful purpose and intent to affect the armed forces and thereby to violate the sedition statute.

50 U. S. C. A. 33;
United States v. Hall (D. C. Mont. 1918), 248 Fed. 150, at page 153.

In the first eleven counts of indictment it was not sufficient to merely state that the language quoted was uttered with intent to violate the law. That was a mere legal conclusion. A statement of facts was required to clearly show that the case was one outside the protection of the constitutional guarantee of free speech and free press. The question was not for the pleader, but for the court, and the facts should have been set forth so that the court could have seen whether or not they constituted a crime.

United States v. Hess, 124 U. S. 483, at p. 486, 8 Sup. Ct. 571 at p. 573.

It has been intimated that there may be an abuse of power in indicting for both conspiracy and the substantive offense, but no remedy for the same has thus far been pointed out.

Heike v. United States, 227 U. S. 131, 33 Sup. Ct. 226, at page 229;

United States v. Kissel, 173 Fed. 823 (C. C. S. D. N. Y. 1909), at p. 825;

Hart v. United States (C. C. A. 2, 1917), (153 C. C. A. 297), 240 Fed. 911, at page 916.

The twelfth count does not clearly exhibit a purpose to violate the statute denouncing the substantive offense and therefore is insufficient.

United States v. Goldman (D. C. Conn. 1928), 28 Fed. (2d) 424, at page 433;

Harvey v. United States (C. C. A. 2d 1903), 126 Fed. 357, at page 358.

Count Twelve is insufficient in that the overt acts alleged were consistent with the innocence of the petitioners.

U. S. ex rel. Jordan v. Glass (C. C. A. 3rd), 25 Fed. (2d) 941, at pages 842-943.

Count Twelve does not show how and through what medium, representative, agent, or employee, the corporation was supposed to have conspired. Petitioners Pelley, Brown, and Henderson are named as co-defendants but it is not averred that either one of them represented the corporation in coming to an unlawful agreement; it is simply averred by conclusion that the corporation conspired with them and all with each other. The indictment alleges that petitioner Pelley was president, petitioner Brown was secretary, and defendant Henderson was treasurer, and no

authority is shown for either to have represented the corporation. There was nothing inherent in their offices which would authorize them so to do.

13 American Jurisprudence, pp. 852, 876, to 878, 884 to 885, and 886 to 888 (Sections 864, 897, 908, 912, and 914);
14A. C. J. Secs. 3049 to 3057 and 2073.

Neither count of the indictment shows how or through what medium the corporation acted or could act in accomplishing the alleged crimes. A connection between the corporation and the intent and between it and the conspiracy was necessary. It could only have acted through some person or persons as agents or representatives.

N. Y. Railroad v. United States, 212 U. S. 481, 29 Sup. Ct. 304, at page 308.

The mere existence of a state of war does not suspend or change the operations of the guaranties and the limitations of the Constitution and its amendments.

C. BILL OF PARTICULARS

The Honorable Circuit Court of Appeals erred in affirming the decision of the District Court in refusing petitioners a bill of particulars to illuminate the various counts of indictment.

Petitioners were entitled to a bill of particulars, as the averments followed the language of the statute and were general in terms.

Zoline's Federal Criminal Law and Procedure, 1921, Vol. 1, Chapter XXVI, Sec. 257, pages 204-206;
Kirby v. United States, 174 U. S. 47, 19 S. C. 574, page 580, 43 L. Ed. 890.

A bill of particulars, not having been made by the grand jury on oath, could not cure the failure of the indictment to sufficiently inform the defendants of the charges against them, for it is no part of the record.

> Foster v. United States (C. C. A. 9, 1918), 253 Fed. 481, at pages 283-284.

When an indictment is good on demurrer, but still does not furnish defendants all the information they are entitled to have before going to trial, a bill of particulars should be granted.

> Foster v. United States (C. C. A. 9, 1918), 253 Fed. 481, at pages 283-284.

The decision of the Honorable Circuit Court of Appeals as to the sufficiency of the indictment is in conflict with the cases of Foster, et al. v. United States, 253 Fed. 481, and Shilter v. United States, 257 Fed. 724 (both decisions of the Circuit Court of Appeals for the 9th Circuit), and with the case of Martin v. United States, 168 Fed. 198, a decision by the Circuit Court of Appeals for the 8th Circuit.

The case of Foster v. United States, supra, holds that an indictment charging the defendants therein with having conveyed false reports with intent to interfere with the success of the military and naval forces of the United States, but which did not specify the reports or to whom they were made, but merely followed the language of the statute, was not sufficient, the statute itself being general. The case of Shilter v. United States, supra, holds that an indictment charging the defendant with having made seditious statements with intent denounced by the Espionage Act and that he thereby wilfully, unlawfully, and knowingly attempted to cause insubordination, disloyalty,

and refusal of duty in the military and naval forces of the United States is not sufficient where there was nothing to connect the acts of the defendant directly or indirectly with such military or naval forces. The case of Martin v. United States, supra, holds that the crime and every ingredient of which it is composed must be clearly and accurately alleged in the indictment, where the statute does not "fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute an offense intended to be punished," an indictment in the words of the statute is insufficient.

D. ADMISSIBILITY OF CERTAIN EVIDENCE

The Honorable Circuit Court of Appeals erred in failing to decide the questions pertaining to the admissibility of Government's Exhibits numbered 13, 15, 16, 17-A, 18, 20, 30, 33-A, 33-B, 33-C, 3-D, and 34, consisting of various publications from 1933 to 1939.

The District Court erred in admitting into evidence each of plaintiff's exhibits numbered 13, 15, 16, 17-A, 20, 33-A, 33-B, 33-C, 33-D, and 34 (published from 1933 to 1939), respectively. These were hearsay as to the petitioners Brown and Fellowship Press, Inc.; and were not relevant or germane to any issue involving the petitioner Pelley. They were not relevant to the charge of conspiracy, which is alleged to have been formed on and after December 8, 1941.

> Wharton's Criminal Evidence (1935), Vol. 1, Sections 222 to 227, inclusive, pp. 259-273;
> Wharton's Criminal Evidence (1935), Vol. 2, Sec. 711, pp. 1197-1198.

Exhibit 13 was "The Door to Revelation, an Autobiography by William Dudley Pelley," published in 1939. Ex-

hibit No. 15 was "Pelley's Weekly" issue of March 4, 1936, containing therein an article entitled, "German-Americans Should Support the Commonwealth." Exhibit 34 was a publication with the heading, "Asheville, North Carolina, Silver Shirts of America Official Dispatch," and published in 1933. Exhibit No. 16 was "Pelley's Weekly," issue of April 22, 1936, containing an article entitled, "Pelley Addresses Germans on National Relationships." Exhibit No. 17-A was a cover of pamphlet entitled, "One Million Silver Shirts by 1939," and the article admitted under this number was taken from the March 28, 1939, issue of "Liberation." Exhibit No. 20 was a reprint of Government's Exhibit 15, in the form of a leaflet, which leaflet contained only a reprint of the article, "German Americans Should Support the Christian Party," and was published March 4, 1936.

Each of the above articles was written and published by Mr. Pelley, and there is no evidence that either Brown or the Fellowship Press, Inc., had anything to do or were in any way connected with their publication.

These articles were published years before and when the United States was not, at war. There could not have possibly been a seditious crime committed at that time by the publishing and circulation thereof. Some of them mentioned the Silver Shirt Legion, which the evidence clearly shows was disbanded in the latter part of 1939 or the early part of 1940, and there has been no activity along this line since. The indictments clearly charge the crimes to have been committed "from December 8, 1941, to the date of this indictment." We feel that we need only state that had the writing and publication of the articles set out in these Exhibits been of a criminal nature, then and in that event, they would have been independent, and disconnected crimes, and that the

general rule in admitting evidence of other crimes would go only to the fact that such other crimes tend to prove the defendant guilty of the crime for which he is being tried, but in this case it was not a crime to utter, print, publish, and distribute in 1933, 1936, 1938, or 1939, the articles set out in the above Exhibits, and their admission into the evidence could do nothing else except to prejudice the jury. They were not relevant to the issues in the case and they were not connected with the acts as charged in either Count of the indictment. With respect to Exhibits 33, 33-A, 33-B, 33-C, and 33-D, the same were registration statements with the State Department of the German Library of Information of New York City, filed on April 8, 1941, being a comprehensive statement of the nature of the business of the registrant, "The German Library of Information" was a library of information on the social, cultural, political, and economic development of Germany. It comprised several thousand books, pamphlets, periodicals, newspapers, official documents, and standard works on law, economics, history, philosophy, art, sports, etc. Its services were available upon request. The library also published at more or less weekly intervals a publication known as 'Facts in Review.' It also published certain official German 'White Books,' and a weekly radio program entitled, 'Germany Calling.'" (Transcript of Record 497-623.) This evidence was not in any manner connected up with either of the defendants. Neither of the defendants were shown to have any part or to have been connected with the issuance of any statements therein contained. It was purely hearsay, irrelevant and incompetent in the trial of the issues of this case. It was read and exhibited before the jury, when Germany was one of the most despised enemies of

the Government of the United States. Under these circumstances it was highly prejudicial.

None of the Exhibits hereinabove referred to show or attempt to show any existence of a conspiracy between Mr. Pelley, Mr. Brown, or the Fellowship Press, Inc. It was legally impossible to conspire to violate the Sedition Act prior to December 8, 1941. The Twelfth Count of the indictment charges that the conspiracy began on December 8, 1941.

At the time the trial court overruled the separate objections of each of the petitioners, the court announced that the Exhibit 13 was competent on conspiracy and the others on intent without limiting the scope of this evidence. (Record p. 307.) It was not for the jury to decide the competency of the evidence under the court's instructions.

In Collenger v. United States, C. C. A. 7th Circuit, 50 Fed. (2d) 345, at page 349, the court said:

> "It is contended for the government that whatever of error there may have been in the admission in evidence of the statements and testimony of conversations, or the failure to limit their application, was obviated or cured by that part of the court's general charge at the close of all the evidence, which was: 'I instruct the jury that the statements of co-conspirators are admissible if made during the conspiracy and in furtherance of the object of the conspiracy and are admissible as against all persons who are in the conspiracy, but that these statements are not to be used for the purpose of establishing the existence of the conspiracy itself.'
>
> "This charge, in effect, put it up to the jury to decide whether the statements and evidence were admissible against the complaining defendants. This was a function of the court, not of the jury. The

statements and conversations were but narratives of past events, in no respect attributable to the conspiracy. They were purely hearsay, and inadmissible as to all the defendants save those who made them. It was for the court to pass upon their admissibility, and indeed it did so pass—in overruling objections to their admissibility against the objecting defendants or in denying motions, made after they were received in evidence, to so limit their application. These rulings closed the matter so far as the objecting defendants were concerned, and they were not thereafter required to seek further ruling by the court in order to avail of any error in the rulings thereon already made. As we have above suggested, such evidence should on objection or motion have been rejected or stricken out as to the other defendants, when it was evident that it was but hearsay. That was the least the court could have done to protect defendants against whom the statements and evidence were not competent from the serious menace of their influence. The charge given is the statement of a mere abstract principle of law which the jury was quite unqualified to apply to the many defendants and to the many instances of the reception of such evidence in the course of this lengthy trial.

"Had the charge specifically pointed out that this or that statement received in evidence, or this or that evidence of what a given defendant had related to the witness, was incompetent and not to be used against specifically named defendants, it might perhaps have served sufficiently to have neutralized the virus of the improper admission or refusing to strike. This we need not decide, since the charge given did not serve to guide the jury as what evidence should be rejected.

"The failure to exclude or limit this evidence may indeed account for Collenger's conviction, apparently upon such a statement alone, concededly incompetent as to him. If such incompetent evidence of the same

kind, improperly received as to other of the defendants, in all probability tended materially to influence the result as to them.

"The government's contention that the statements and evidence were admissible as res gestae is altogether too far-fetched and groundless to merit discussion."

The publications (Exhibits 13, 15 and 16) were not admissible upon the issues of wilfulness and intent.

The question of wilfulness and intent pertains only to the charges in the indictment—that is to say, the query arose as to whether or not the publications set forth in the indictment were made for the wilful purpose and intention to disrupt the military and naval organizations. The fact that one of the petitioners may have admired Hitler at certain stages of the latter's career, and that he may have had a friendly attitude at one time toward the German people, would not at all tend to prove that he, or anyone else, proposed, or had the intention to interfere with the military or naval organizations. Such would not tend to show that either one of the petitioners proposed, or intended, to obstruct the recruiting service, or to cause insubordination or insurrection of the armed forces.

The publications of 1936 certainly could not have applied to Brown, who was not even employed by the Pelley organization until 1937, or thereafter. (Record p. 299.) Such certainly could not have applied to the corporation, which was not in existence until November, 1940. (Record pp. 373-374.) The court, however, permitted the jury to apply this evidence to all petitioners without any limitation. As was said in the Collenger case, the limitation should have been presented at the time of admission, if

the evidence were competent as against anyone. At the time the Exhibit 13 was offered, each of the petitioners objected separately. (Record pp. 307-308.)

The testimony of Government witnesses Richter, Graves and Laswell was not properly admitted, and the Honorable Circuit Court of Appeals erred in deciding that it was admissible.

Mrs. Persis Richter testified on behalf of the Government that she and four assistants studied editorial comments in connection with certain statements which came from several issues of The Galilean Magazine, which study covered a total of 52 daily newspapers and included some 834 issues of those newspapers, wherein they found a total of 280 statements in editorials and in editorial columns which they considered to be refutation of the articles quoted and alleged in Counts Two, Three, Five, Seven, Eight, and Nine of the indictments; which incidentally was the only evidence the Government offered in an attempt to show that the statements in those counts were false—hence the materiality of this evidence cannot be doubted. (Record pp. 435 to 443, incl.) That she was employed in the Media Division of the Bureau of Intelligence in the Office of War Information; that her assistants used the same method that she did to abstract these editorials; that these assistants wrote out their opinions and reports and handed them to her; she made a study of approximately 50 per cent of the papers herself and her assistants abstracted about 50 per cent of the papers.

Over the objections of the petitioners this witness was permitted to give her opinions as to what she and her assistants concluded to be refutation of the statements contained in the several issues of The Galilean Magazine,

upon which said several counts of indictment were based. The evidence does not show or attempt to show who wrote the editorials that were abstracted, whether or not they were true, whether or not the writers of those editorials had any connection with petitioners Pelley, Brown, and Fellowship Press, Inc.

The editorials so abstracted were not identified and offered in evidence so that the jury might know their contents; and the question as to whether or not the editorials which this witness and her assistants considered as refutation of the said articles were in fact refutation would have been purely one for the jury to determine, had such editorial been competent at all on any issue. Her opinions were based purely on hearsay, and no more competent than the editorials themselves would have been.

The opinions of this witness, together with the opinions given to her by her four assistants which she in turn analyzed as her opinion, could not constitute proper evidence in this case, was not pertinent to any of the issues and could not throw any light thereon, nor was it germane to any of the issues in the case; on the other hand it represented, in part, hearsay and the opinion of this witness; it consisted of testimony based upon speculation, surmise and conjecture; and the dates of the editorials which were investigated and analyzed preceded the dates of the statements made in The Galilean Magazine.

The jury in order to convict the defendants on Counts Two, Three, Five, Seven, Eight, and Nine was called upon to believe the quoted statements therein to be false because she guessed from the newspaper editorials that the quoted statements were thus refuted.

Harold Graves, a witness produced on behalf of the

Government, employed in Washington, D. C., by the Federal Communications Commission, and an assistant director of foreign broadcast intelligence service for the Commission, was, over objections, permitted to testify concerning what had been heard and analyzed as coming over the short wave radio and originating in Berlin, Germany, Vichy or Paris, France, as well as other foreign countries, pertaining to the amount of time spent by those broadcasts in discussing the military conditions and political leadership of the United States and Great Britain. Over objection of the petitioners this witness was permitted to testify before the jury for the purpose of showing what were the fourteen German propaganda broadcast themes and to lay the foundation for the next witness, Harold Laswell, to testify with respect to the same thing. There is no attempt to connect the German broadcasts with either of the counts of the indictment or any part thereof. What the German short wave radio said as listened to and analyzed by this witness in the absence of showing connection therewith, would not in any manner be binding upon either of the petitioners herein, and the petitioners should not be held responsible for what the Germans or anyone else said or did. Such testimony was purely hearsay, and highly prejudicial.

Harold A. Laswell, a political scientist specializing in analysis of public opinion and propaganda, and head of the Research on War Communications at the Library of Congress in Washington, D. C., was, over objections, permitted to testify concerning an examination and an analysis which he made of the issues, including the December 22, 1941, through March 2, 1942, of The Galilean Magazine, for the purpose of determining to what extent the statements made in The Galilean were consistent with

the fourteen German propaganda themes and to what extent they contradicted those themes.

His comparison of the articles upon which several of the counts of indictment were based with the fourteen German propaganda themes, to which he and Graves testified, were the basis of his opinion to the effect that in the articles there were 1195 statements consistent with fourteen German propaganda themes and 45 statements inconsistent therewith. Needless to say this was very prejudicial. As the result of this examination and analysis by the witness he had prepared certain charts based upon his own conclusions, showing by pictures of black bars of various lengths, his conception of the relative consistencies and inconsistencies between the articles in The Galilean Magazine and the enemy propaganda themes. These were permitted, over objection, to be exhibited, and testimony adduced therefrom before the jury. Petitioners most earnestly contend that these charts and the testimony of this witness consisted entirely of hearsay; that it consisted of self-serving declarations on the part of the Government, made by the Government as against the petitioners; that the charts offered in connection therewith would tend to invade the province of the jury; and that as to the conclusions thereof, which were sought to be introduced by such a method before the court and jury, the defendants were not apprised of the facts and had no opportunity to see or to investigate the facts in connection therewith. Petitioners submit that such testimony was hearsay, incompetent and prejudicial.

CONCLUSION

It is therefore respectfully submitted:

1. That by failing to reverse the judgment of the District Court on the Pleas in Abatement the Honorable Circuit Court of Appeals erred in its decision as to the exclusion of women from the grand jury which returned the indictment in this case, contrary to and in contravention of Amendments 5 and 19 of the Constitution of the United States, in conflict with the applicable decisions of this Honorable Court, the Statutes of the United States, and of the State of Indiana.

2. The question as to the constitutionality of the Act of Congress of June 30, 1906, Chap. 3935 (34 Stat. 816, 5 U. S. C. A. 310) has never been decided by this Honorable Court.

3. The several new questions in this case call for an exercise of this Court's decision, for the reason that the law pertaining to the same is unsettled.

4. That when the Honorable Circuit Court of Appeals failed to reverse the judgment of the District Court it decided important questions of general and constitutional law in a way in conflict with the weight of authority and contrary to the uses and practices of this court, and so far sanctioned such a departure from the usual and accepted course of judicial proceeding by the lower court as to call for an exercise of this Court's power of supervision.

5. That by failing to reverse the judgment of the District Court and remanding the cause for trial, the Honorable Circuit Court of Appeals deprived the petitioners of their constitutional, statutory, and legal rights to trial and hearing guaranteed them thereunder.

WHEREFORE, For the purpose of reviewing said judgment and correcting the errors therein a writ of certiorari should issue as prayed.

Dated at Indianapolis, Indiana, January 12, 1943.

Respectfully submitted,

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APPENDIX

Section 4-3304, Burns Indiana Statutes Annotated, 1933:

"**Selection of names for jurors.**—Said commissioners shall immediately, from the names of legal voters and citizens of the United States on the tax duplicate of the county for the current year, proceed to select, and deposit in a box to be furnished by the clerk for that purpose, the names, written on separate slips of paper, of uniform shape, size and color, of twice as many persons as will be required by law for grand and petit jurors in the courts of the county, for all the terms of such courts to commence within the calendar year next ensuing. Such selection shall be made, as nearly as may be, in equal numbers from each county commissioner's district. In making such selections, they shall, in all things, observe their oath; and they shall not select the name of any person who is not a voter of the county, or who is not either a freeholder or householder, or who is to them known to be interested in or has a cause pending which may be tried by a jury to be drawn from the names so selected. They shall deliver the box, locked, to the clerk of the circuit court, after having deposited therein the names as herein directed. The key shall be retained by one of the commissioners not of the same politics of the clerk. (Acts 1881 (Spec. Sess.), ch. 69, Sec. 2, p. 557.)"

Section 4-3317, Burns Indiana Statutes Annotated, 1933:

"**Qualifications of jurors.**—To be qualified as a juror, either grand or petit, a person must be a resident voter of the county, and a freeholder or householder. Any person shall be excused from acting as a juror who is over sixty (60) years of age and desires to be excused for such reason. (Acts 1881 (Spec. Sess.), ch. 69, Sec. 9, p. 557; 1917, ch. 176, Sec. 1, p. 688.)"